

Clean Water 404 Assumption Update Regulation

Analytic Blueprint for Proposed Rule

Dated August 9, 2018

A. Purpose of the Analytic Blueprint

Ex. 5 Deliberative Process (DP)

B. Background

Under the CWA Section 404, a permit is required before dredged or fill material can be discharged into the “waters of the United States.” In most states, the U.S. Army Corps of Engineers (USACE) administers the Section 404 permit program and issues permit decisions. The CWA provides states and tribes the option of assuming administration of the Section 404 permit program for certain waters within state or tribal jurisdiction provided the state or tribe develops a permit program consistent with all applicable statutory and regulatory requirements and submits an application to EPA.

In response to requests from states and tribes, the Office of Water will be initiating a new rulemaking process to provide greater clarity on the requirements for state and tribal assumption of the CWA Section 404 permitting program. This rule has been tiered and assigned as a Tier 2 rulemaking. This rulemaking will follow the criteria for Tier 2 rules.

Through this effort, EPA seeks to provide clarity as to which waters can be assumed under an approved state or tribal program and make technical corrections and updates to the 1988 Section 404 regulations. This rulemaking effort will respond to:

- Recommendations provided by the National Advisory Council for Environmental Policy and Technology (NACEPT) in 2017, which considered how EPA could clarify which waters a state or tribe assumes and which waters the USACE retains¹;

¹ [HYPERLINK "<https://www.epa.gov/cwa-404/submission-assumable-waters-subcommittees-final-report>"]

- Requests from states and tribes to clarify the requirements for program assumption²;
- The Office of the Administrator's June 26, 2018 memo on regulatory certainty in permitting processes; and
- The administration's objective to place more states and tribes in the decision-making position on permits by facilitating their assumption of the CWA Section 404 permitting program.

The objective to place states and tribes in the role of decision maker is an Administration priority and stated in:

- Goal 2 of the current Agency Strategic plan which states: "Cooperative Federalism; rebalance the power between Washington and the states to create tangible environmental results for the American people";
- Objective 1.2 of the current Agency Strategic Plan which states "In cooperation with the Army Corps of Engineers, work with states and tribes interested in assuming the Clean Water Act Section 404 program"; and
- The Office of Water's National Program Plan directs EPA to: Effectively oversee states that assume the CWA Section 404 permitting program; Review and implement recommendations from the Assumable Waters Federal Advisory Committee Act (FACA) subcommittee; and advise states and tribes on matters related to state or tribal assumption of the CWA 404 permit program.

C. Identification of Proposed Rule Significant Issues and Options

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² ECOS resolution 08-3, April 14, 2008; 2010 ECOS workgroup; ECOS, ACWA, ASWM letter December 6, 2010; Comments at [[HYPERLINK "https://www.regulations.gov/searchResults?rpp=25&po=0&s=EPA-HQ-OA-2017-0190&fp=true&ns=true"](https://www.regulations.gov/searchResults?rpp=25&po=0&s=EPA-HQ-OA-2017-0190&fp=true&ns=true)], EO 13777 "Enforcing the Regulatory Reform Agenda."

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D. Methodology for Developing and Analyzing Rule Options

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E. Characterization of Current State Practices

Since the enactment of 404(g) in 1977, only two states and no tribes have assumed the Section 404 program. Obstacles to assumption include potential changes to the definition of “waters of the U.S.,” uncertainty of which waters may be assumed, the lack of funding associated with Section 404 assumption, and the need for broad public and political support. The following provides a brief description of the two current assumed programs.

- *Michigan:* On October 16, 1984, the State of Michigan (MI) assumed the CWA Section 404 program for regulated discharges of dredged and fill material into most inland lakes, streams, and contiguous wetlands. The USACE retains permitting authority over Section 10 Waters, including the Great Lakes and adjacent wetlands (defined by a MOA between USACE and MI). The MI state agency authorized in 1984 to administer the approved CWA Section 404 program was the Department of Natural Resources. Later, the State of Michigan reorganized its agencies and transferred authority to administer the approved CWA section 404 program to the Michigan Department of Environmental Quality (MDEQ).

MI relies on two statutes as providing the principal authority for its CWA section 404 program: Part 303 of the Michigan Natural Resources and Environmental Protection Act (NREPA), entitled Wetlands Protection, and Part 301 of the NREPA, entitled Inland Lakes and Streams. MI’s program is funded by a combination of general funds, unclaimed bottle deposit revenue, funds from the Michigan Department of Transportation, federal grants, and permit fees. EPA’s oversight is further defined by a 2011 MOA, which defines state and federal responsibilities under Section 404, describes reporting requirements, and defines which permit categories that EPA will review.

- *New Jersey:* On March 2, 1994, the State of NJ assumed the CWA Section 404 program for regulated discharges of dredged and fill material in most freshwater wetlands in NJ. NJ’s state-assumed program is administered by the NJ Department of Environmental Protection (NJDEP) through its Freshwater Wetlands Protection Act, which was passed in 1987. One goal of this Act directed NJDEP to work towards the assumption of Section 404. Because of this, the Freshwater Wetlands Protection Act and its implementing rules closely resemble the provisions of CWA Section 404. The Freshwater Wetlands Protection Act regulates all wetlands and waters of NJ. In addition to federally regulated activities, NJ’s Freshwater Wetlands Protection Act also regulates wetland buffers; cutting of wetland vegetation; drainage or disturbance of water levels; excavation of wetlands; and non-jurisdictional federal wetlands under SWANCC and Rapanos.

The Freshwater Wetlands Protection Act regulates all wetlands and waters of NY. In addition to federally regulated activities, NJ’s Freshwater Wetlands Protection Act also regulates:

- Wetland buffers
- Cutting of vegetation
- Drainage or disturbance of water levels
- Excavation of wetlands
- Non-jurisdictional federal wetlands under SWANCC and Rapanos

Areas not assumed by NJ include:

- The entire length of the Delaware River and adjacent wetlands
- Waters of the U.S. falling under the jurisdiction of the Hackensack Meadowlands Commission
- Greenwood Lake and adjacent wetlands
- All tidal water bodies to the head of tide and adjacent wetlands
- All waterways served by an existing or proposed federal navigation project and adjacent wetlands

F. Stakeholder Outreach

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G. Economic Analysis

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H. Further Analyses Post-Proposal

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¹ ICR 0220.12, OMB Control No. 2040-0168. (<https://www.federalregister.gov/documents/2017/07/03/2017-13905/proposed-information-collection-request-comment-request-clean-water-act-section-404-state-assumed>)